**TUN DATU HAJI MUSTAPHA BIN DATU HARUN**

**v.**

**STATE LEGISLATIVE ASSEMBLY OF SABAH & ANOR.**

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID B. SYED ABDULLAH IDID J.
[ORIGINATING SUMMONS NO. K. 42 OF 1992]
23 OCTOBER 1992

***CONSTITUTIONAL LAW: Whether Article 18(2)(d) of the Sabah State Constitution is ultra vires Article 10(1)(c) of the Federal Constitution - Similarity between Article 18(2)(d) and Article XXXIA(1) of the Kelantan State Constitution - Jurisdiction of the Supreme Court under Article 128(2) of the Federal Constitution to determine question and remit same to the court below.***

***PRACTICE AND PROCEDURE: Interlocutory reference of matter by High Court to Supreme Court - Plaintiff applied for declaration that Article 18(2)(d) of the Sabah State Constitution is invalid, null and void for being ultra vires the Federal Constitution - Defendants applied to strike out the plaintiff's originating summons - Defendants' application dismissed - Defendants appealed against Judge's decision - Neither party apply to court for case to be stated to Supreme Court - Judge invoking s. 48 Courts of Judicature Act 1964 to state a Special Case having regard to there being an appeal pending and the speedy and economical final determination of the proceedings.***

The plaintiff applied for a declaration that Article 18(2)(d) of the Sabah State Constitution is invalid, null and void as it is ultra vires Article 10(1)(c) of the Federal Constitution. The first and second defendants subsequently applied separately under O. 12 r. 7, O. 18 r. 19 Rules of the High Court 1980 for an order to strike out the plaintiff's application.

The Judge, after hearing both defendants' applications together, dismissed their applications.

The defendants appealed against the learned Judge's decision.

In the meantime neither party asked that this action be stayed for the purpose of formulating a question or questions to be sent up as a Case Stated to the Supreme Court for determination.

**Held:**

**[1]** The question before the court is indeed a question of construction and therefore a pure question of law. There being an appeal against the Judge's decision, s. 48 of the Courts of Judicature Act 1964 is invoked to state a Special Case to await the decision of the questions.

**[2]** The decision to state the Special Case is made having regard to the speedy and economical determination of the proceedings. As the defendants have appealed, the Judge stating a Special Case will enable the Supreme Court to dispose off both the appeal and the questions, either together or one before the other, thus saving time and costs.

**[3]** Upon remittance by the Supreme Court, if the answers to the said questions are in the affirmative, the declarations sought by the plaintiff shall be granted. If the Supreme Court's answers are in the negative, the plaintiff's originating summons will be dismissed with costs.

**[4]** Accordingly, the proceedings are stayed and the Special Case Stated is transmitted to the Supreme Court in accordance with the Rules of the Supreme Court 1980, Part XI, Special Constitutional Case, r. 36(1) and (2) and 37 and the Court will, in due course, continue the proceeding and dispose off the plaintiff's application as stipulated in r. 39, if necessary.

*[Proceedings stayed. Special case stated for determination of Supreme Court.]*

**Cases referred to:**

*Mark Koding v. PP [1982] 2 MLJ 120 (refd)*
*Fernandez v. Attorney-General [1970] 1 MLJ 262, 264 (cit)*
*Ah Thian v. Government of Malaysia [1976] 2 MLJ 112 (refd)*
*Nordin bin Salleh & Haji Wan Mohd. Najib v. Dewan Undangan Negeri Kelantan & Ors. (Guaman No: R1-22-11-91) [1992] 1 MLJ 343 (refd)*
*Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor. [1992] 2 CLJ 1125 and at 1140 [1992] 1 MLJ 697 (SC). (refd)*
*Hashim bin Saud v. Yahaya bin Hashim [1973] 2 MLJ 85 (refd)*
*Marbury v. Madison [1803] 1 Cranch 137 (refd)*
*Gopalan v. State of Madras A.I.R. 1950 SC 27 (refd)*

**Legislation referred to:**

Constitution of the State of Kelantan, Article XXXIA(1)
Constitution of the State of Sabah, Article 18(2)(d)
Courts of Judicature Act 1964, s. 48(2)

Federal Constitution, Articles 4(1), 10(1)(c), 128(2)
Rules of the High Court O. 12 r. 7, O. 18 r. 19
Rules of the Supreme Court 1980 Part XI rr. 33, 34, 35, 36 & 37

**Other sources referred to:**
Sheridan, L.A. and Groves, Harry E., **The Constitution of Malaysia** (1987) 4th Edition

*For the respondent/plaintiff - Zaki Tun Azmi (Hajjah Azizah Mohd. Dun with him); M/s. Azizah, Joifin Mohd. Dun & Co., Kota Kinabalu*
*For the applicants/first and second defendants - Stephen Foo Kiat Shin (Juprin Wong with him); State Attorney-General Sabah, Kota Kinabalu*

**JUDGMENT**

**Syed Ahmad Idid b. Syed Abdullah Idid J:** It was understood by all parties that today be set for the hearing of the main application by the plaintiff for a declaration that Article 18(2)(d) of the Sabah State Constitution is invalid, null and void as it is *ultra vires* Article 10(1)(c) of the Federal Constitution. The plaintiff also asks for costs and such further or other relief that this Court may deem fit and just. Costs technically includes fees, charges, disbursements, expenses and remuneration and normally it follows the event.

The plaintiff then applied on 1 July 1992 to include the Yang Di-Pertua Negeri and Sabah State Government as defendants. This was heard on 6 July 1992, the date which the Court had earlier fixed to hear the plaintiff's originating summons. The State Government of Sabah was then added as second defendant.

The first and second defendants filed their summons-in-chambers and applied respectively on 25 May and 29 July for an order to strike out the plaintiff's originating summons (under O. 12, r. 7 and O. 18, r. 19 of the Rules of High Court 1980).

The defendants' applications were heard together on 7 September 1992 and the decision delivered on 22 September 1992. There was no request for any earlier date to hear the main application and dispose of it. The one month grace period was given to the defendants in case of any appeal. The Court then fixed today for both parties to argue and submit and conclude the matter. In the meantime neither party asked that this action be stayed for the purpose of formalising a question or questions to be sent up as a Case Stated to the Supreme Court for determination. Both parties could have applied to the Court to have the question of whether Article 18(2)(d) of the Constitution of the State of Sabah is *ultra vires* the Federal Constitution. The Court would have favourably considered it.

The Court on its own did not refer any question to the Supreme Court because the Federal Court had expressed a distaste for interlocutory reference in *Mark Koding v. PP* [1982] 2 MLJ 120 where Tun Suffian (then LP) said:

> ... we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v. Attorney-General* [1970] 1 MLJ 262, 264, and decided the case one way or the other. If he had done that and there was an appeal to us, the whole matter would have been disposed of in two steps. By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s. 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.

In the action before this Court, the question which arises today, whichever way one looks at it, is:

> Is Article 18(2)(d) of the Constitution of the State of Sabah *ultra vires* Article 10(1)(c) of the Federal Constitution and so is invalid, null and void?

(i) Article 18(2)(d) of the Constitution of the state of Sabah reads:

> 18(2) An elected or nominated member shall also vacate his seat in the Assembly if -
>
> ...
>
> (d) he resigns or is expelled from, or for any reason whatsoever ceases to be a member of, the political party of which he is a member.

(ii) Article 10(1)(c) of the Federal Constitution reads:

> 10 (1) Subject to Clauses (2), (3) and (4) -
>
> ...
>
> (c) all citizens have the right to form associations.

This Court is also mindful of the decision in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112 which held that:

> the point (that the Act was inconsistent with Article 4(4) of the Federal Constitution) may be raised in the ordinary course of submission and determined by the High Court without reference to the Federal Court.

The Federal Court explained then that written law may be invalid on one of three grounds, the second being in the case of both Federal and State written law which is inconsistent with the Constitution - Article 4(1). Suffian LP went on to say that:

> the courts' power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

In the concluding paragraph it was stated that:

> But in any event matters like this as a matter of convenience and to save the parties time and expenses are best dealt with by him (the Judge) in the ordinary way, and the aggrieved party should be left to appeal in the ordinary way to the Federal Court.

I am grateful to the learned State Attorney-General for providing this Court with a printed copy of the Constitution of the State of Sabah. I refer to Article 18(2)(d). These words are exactly the same as those in Article XXXIA(1) of the Constitution of the State of Kelantan:

> ... resigns or is expelled from, or for any reason whatsoever ceases to be a member of (such) political party.

Sabah's Article 18(2) spells out that "An elected or nominated member shall also vacate his seat in the Assembly" (upon the happening of the resignation, expulsion or cessation of membership) whereas the Kelantan Article says (on the happening of the same events): "... he shall cease to be a member of the Legislature and his seat shall become vacant". So in substance there does not appear to be much difference in the meaning and import of such parts of the Articles. I do not think in all seriousness that either plaintiff or defendants will want to argue that "vacate his seat" and "his seat shall become vacant" have diverse meanings or implications. But should there be a wish to contest this, either party or both are entitled to do so.

The Article XXXIA(1) of the Kelantan State Constitution became the subject matter of the Kuala Lumpur High Court action of *Nordin bin Salleh & Haji Wan Mohd. Najib v. Dewan Undangan Negeri Kelantan & Ors.* (Guaman No: R1-22-11-91) [1992] 1 MLJ 343. In that case, Dato' Haji Mohd. Eusoff bin Chin J. (as His Lordship then was) made an order declaring that

> Article XXXIA of Part One of the Constitution of the State of Kelantan is inconsistent with Article 10(1)(c) of the Federal Constitution and is void under Article 4(1) of the Federal Constitution to the extent only that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan Legislative Assembly to resign his membership of a political party.

The Dewan appealed and the Supreme Court dismissed the appeal with costs. See *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor.* [1992] 2 CLJ 1125 and another at 1140; [1992] 1 MLJ 697 (SC). The inconsistency of Article XXXIA of the Kelantan Constitution *vis-a-vis* Articles 4(1) and 10(1)(c)/(2)(c) of the Federal Constitution was the issue before the Supreme Court. Tun Abdul Hamid Omar LP agreed with the learned Judge in the Court below that by virtue of Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void "though on somewhat different grounds".

By Article 128(2) of the Federal Constitution, the Supreme Court shall have jurisdiction to determine the question (as to the effect of any provision of the Constitution) and remit the case to the other Court (which in our case is the High Court in Borneo) to be disposed of in accordance with such determination. *Hashim bin Saud v. Yahaya bin Hashim* [1973] 2 MLJ 85.

What faces this court today is indeed a question of construction and therefore a pure question of law. There is an appeal by the learned State Attorney-General against my decision delivered on 22 September 1992. That being so, I shall invoke s. 48 of the Courts of Judicature Act 1964 and state a Special Case to await the decision of the questions by the Supreme Court.

I have come to this decision having regard to the speedy and economical final determination of the proceedings in deference to the advice of Tun Suffian LP in both *Mark Koding v. PP* [1982] *(supra)* and *Ah Thian v. Government of Malaysia* [1976] *(supra).* I am of the opinion that as the defendants now appeal, my stating a Special Case to the Supreme Court will enable the Supreme Court to dispose of both the appeal and the questions, either together or one before the other, thus saving time and costs.

In accordance with s. 48(3) of the Courts of Judicature Act 1964, read with r. 34(2) and (3), Rules of the Supreme Court 1980, I shall state two questions, *viz:*

(1) Does Article 18(2)(d) of the Constitution of the State of Sabah impose a restriction on the exercise of the fundamental right of a member of the Sabah Legislative Assembly to resign his/her membership of a political party?
(2) If the answer to question 1 is in the affirmative, is Article 18(2)(d) of the Constitution of the State of Sabah inconsistent with Article 10(1)(c) of the Federal Constitution and so void under Article 4(1) of the Federal Constitution?

L.A. Sheridan and Harry E. Groves in their book THE CONSTITUTION OF MALAYSIA [1987] 4th Edition says that "it would appear that Article 4(1) is otiose to this extent, that unconstitutional laws would be invalidated by the courts without it". That is the position achieved in the United States. (See *Marbury v. Madison* [1803] 1 Cranch 137) and in India (see *Gopalan v. State of Madras* A.I.R. 1950 SC 27.

In other words, if the answers to question 1 and question 2 are in the affirmative, I shall grant the declarations which the plaintiff applies for. If the Supreme Court's answers are in the negative, I shall dismiss the plaintiff's originating summons and order costs against him.

It must be stressed here today that Courts can only decide on the evidence and the principles of law on the authorities made available. It is understandable that every Legislature will claim that whatever law it enacts is "the best". Even laws which claim that they have "noble objectives" are challenged. Who can decide what is noble? It is up to the Court, being the conscience of society and being accorded jurisdiction and powers to decide on constitutionality, to decide whether it is so. Two sides, however experienced or qualified, locked in combat can rarely see their field of war. It takes a third force to make observations and bring tranquillity.

Parties dissatisfied with any decision should realise that recrimination is not the solution. An appeal, formulated in the calm atmosphere of wisdom and statesmanship, untrampled by threats of any kind and from any quarters, is the wise course.

Accordingly, I now stay these proceedings and transmit this Special Case Stated to the Supreme Court in accordance with the Rules of the Supreme Court 1980, Part XI, Special Constitutional Case, rr. 33, 34 and 35. It will then be up to the plaintiff to take steps as in rr. 36(1) and (2) and 37. The Court will, in due course, continue these proceedings and dispose of the application by the plaintiff as stipulated in r. 39, if necessary.